NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 28 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

AIRBORNE FREIGHT CORPORATION, a Delaware corporation dba Airborne Express, Inc., Plaintiff - Appellant, v. ST. PAUL FIRE & MARINE INSURANCE COMPANY, a corporation, Defendant - Appellee.	No. 04-35989 D.C. No. CV-03-02390-RSL MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted July 24, 2006
Seattle, Washington

Before: WALLACE, WARDLAW, and FISHER, Circuit Judges.

Airborne Freight Corporation (Airborne) appeals from the district court's grant of summary judgment to Airborne's insurer, St. Paul Fire & Marine

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Insurance Company (St. Paul), in a breach of contract case. Airborne sought indemnification from St. Paul after it settled lawsuits with National Fulfillment, Inc. (NFI) and Sur La Table for lost and damaged packages; St. Paul refused, citing the deductible and scope of coverage provisions of the contract. We review the district court's contract interpretation de novo, applying Washington law. *Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia*, 379 F.3d 557, 560 (9th Cir. 2004). We reverse.

1. Care, Custody and Control

On review of a grant of summary judgment, "[w]e are not to weigh the evidence or determine the truth of the matter, but only to determine whether there is a genuine issue for trial." *Moran v. Selig*, 447 F.3d 748, 753 (9th Cir. 2006) (internal quotation marks omitted). There are material facts in dispute as to whether the United States Postal Service (USPS) was a covered agent of Airborne and whether Airborne retained responsibility and liability for packages once they were handed off to the USPS for delivery to the final consignee.

The interpretation of the "care, custody, and control" exclusion in *Olds-Olympic, Inc. v. Commercial Union Insurance Co.*, 918 P.2d 923, 931 (Wash. 1996), a case involving a comprehensive general liability policy, provides no

assistance in interpreting cargo liability policies, which protect primary carriers for the entire time the cargo is within their physical or legal custody. *See Koury v. Providence-Washington Ins. Co.*, 145 A. 448, 449-50 (R.I. 1929); *Nat'l Fire Ins. Co. v. Davis*, 179 S.W.2d 316, 319 (Tex. Civ. App. 1944); *see also* 11 Couch on Ins. § 154.44 (2006). When the Washington Supreme Court interpreted "care, custody, and control" in *Olds-Olympic* to require that the damaged property be "under the supervision of the insured and [ ] a necessary element of the work involved," it was interpreting a policy exclusion, which Washington courts construe narrowly against the insurer. *Olds-Olympic*, 918 P.2d at 927 ("CGL policies are marketed by insurers as comprehensive and should be strictly construed when the insurer attempts to subtract from the comprehensive scope of its undertaking."); *see also Quadrant Corp. v. Am. States Ins. Co.*, 110 P.3d 733, 737 (Wash. 2005). Here, the term "care, custody, and control" is found in the "scope of coverage" statement, a part of the policy which is construed liberally in favor of the insured. *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 659 P.2d 509, 511 (Wash. 1983). St. Paul's proposed interpretation that "care, custody, and control" requires "supervision" would be inconsistent with the basic purpose and intent of cargo liability insurance, namely to protect the carrier for the entire time it remains liable to the shipper. *See Koury*, 145 A. at 450. Moreover, it would

render illusory the specific insurance contract between St. Paul and Airborne, which on its face covers loss or damage by independent third parties in the shipment process.

Nor is "care, custody, and control" dependent on a formal agency relationship between the primary carrier and any independent contractors. A third party carrier serving under contract can function as an "agent" of the primary carrier, even where the primary carrier does not control the manner of the agent's performance and would not be liable for the agent's independent torts on a *respondeat superior* theory. *See O'Brien v. Haffer*, 93 P.3d 930, 934 n.36 (Wash. Ct. App. 2004) (explaining difference between servant and non-servant agents); Restatement 2d of Agency § 1, cmt. e (1958) (same). St. Paul concedes that the insurance policy covered Airborne's legal liability while packages were being processed or delivered by third-party contract agents and common carriers. The record fails to demonstrate that USPS was in a fundamentally different position with respect to Airborne from those whose loss or damage St. Paul concedes would be covered.

Finally, the policy notes that "[i]nsurance is to attach from the moment the Assured becomes responsible and/or liable and continues until such responsibility or liability ceases," a statement consistent with the common understanding of

"care, custody and control" in a cargo liability policy. *Cf. Koury*, 145 A. at 450.[1] Although the contract between Airborne and USPS is not part of the record, the language of the @Home Service Agreement between Airborne and its shippers, the Airborne Express United States Service Guide, and the deposition testimony could allow a reasonable jury to find that Airborne remained financially and legally liable while the USPS was in physical possession of the packages during the final leg of delivery. Construing these facts in the light most favorable to the non-moving party, *Moran*, 447 F.3d at 753, there was a genuine issue of material fact for trial and summary judgment was improvidently granted.

2. Per-Claim Deductible

St. Paul asks us to affirm summary judgment on an alternative ground, arguing that the $2,500 deductible in the policy must be applied on a per-package basis. As a matter of law, Airborne's claim for indemnification for its settlement is not precluded by the policy deductible. The policy states that St. Paul will "pay all claims in excess of . . . $2,500 on Section 2 Cargo Legal Liability" after the

[1] This legal liability test appears to have been embraced, at least on one occasion, by St. Paul. In response to a question from Airborne's insurance broker as to whether Airborne could file a claim if there was no bill of lading but by contract, Airborne assumed responsibility, a St. Paul employee responded via facsimile that "there is not a claims problem if no Bill of Lading is issued, but by contract they are liable."

$500,000 aggregate deductible is reached.[2] The term "claim" is undefined in the policy, but in analogous contract disputes, Washington state courts have followed standard dictionary definitions and held that "the plain, ordinary meaning of claim is a demand for compensation." *Safeco Title Ins. Co. v. Gannon*, 774 P.2d 30, 33 (Wash. Ct. App. 1989); *see also Windham Solid Waste Mgmt. Dist. v. Nat'l Cas. Co.*, 146 F.3d 131, 134 (2d Cir. 1998) (reviewing the interpretation of the term "claim" in insurance case law across numerous states and holding that "[a] claim may be something other than a formal lawsuit" and requires simply "a specific demand for relief"); *Nat'l Bank of Ariz. v. St. Paul Fire & Marine Ins. Co.*, 975 P.2d 711, 714 (Ariz. Ct. App. 1999) ("A claim is a demand for relief, payment, or something as a right, or as due."). This broad definition of "claim," untethered to a single event or occurrence, is also consistent with insurance industry definitions. *See, e.g.*, Harvey W. Rubin, Dictionary of Insurance Terms 85 (4th ed. 2000) (defining "claim" as a "request by an insured for indemnification by an insurance company for loss incurred from an insured peril"); Wash. State Office of the Ins. Comm'r, A Consumer's Insurance Glossary, www.insurance.wa.gov/consumers/glossary.asp (defining "claim" as a "demand

[2] Both parties agree that the $500,000 annual deductible was reached in the relevant policy year.

for benefits as provided by the policy"). The claims for breach of contract in the NFI and Sur La Table lawsuits, settled for $255,000 and $25,000 respectively, were clearly demands for compensation that derived from the sort of loss envisioned in the contract. As a result, each lawsuit was properly subject to a single deductible.

Nothing in the insurance contract indicates that the deductible was intended to apply on a per-package basis, and we will not re-write the policy to accord with one party's unexpressed intentions. *See Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 760 P.2d 337, 340 (Wash. 1988) ("If the language in an insurance contract is clear and unambiguous, the court must enforce it as written . . . ."); *State Farm Fire & Cas. Co. v. English Cove Ass'n*, 88 P.3d 986, 989 (Wash. Ct. App. 2004).[3] St. Paul's emphasis on the definition of "occurrence" in the policy is

[3] Were we to conclude that the word "claim" in the policy was in fact ambiguous because it could refer to either each individual lost package or, as Washington law appears to hold, to any demand for compensation by NFI and Sur La Table, then we would attempt to discern and enforce the parties' intent, and could consider their historical practices under the policy. *See Transcon. Ins. Co.*, 760 P.2d at 340. However, while St. Paul proffers evidence of Airborne's historical behavior when charged with individual lost package claims, this would be only marginally relevant to determining whether the parties understood the term "claim" also to incorporate a single lawsuit alleging many lost packages, as well as "lost profits, lost opportunities, and cancellation of existing client accounts." Because this extrinsic evidence would not resolve the ambiguity, we would construe the deductible language against the insurer, as we must, *Witherspoon v.*

(continued...)

entirely beside the point, because the deductible in the St. Paul/Airborne policy applies to "all claims," rather than to individual occurrences causing damage. Given the guidance of the Washington courts that we read exclusion language narrowly, *Phil Schroeder*, 659 P.2d at 511, we agree with the district court that "claim" is unambiguous and affirm its denial of summary judgment on that ground.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[3](...continued)
St. Paul Fire & Marine Ins. Co., 548 P.2d 302, 308 (Wash. 1976), and we would reach the same result.